Supreme Court, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

No. 74-1141

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
ANDREW L. FREY,
Deputy Solicitor General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
JEROME M. FEIT,
HARVEY M. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	6
Argument	15
I. The *Milanouich* decision does not require a new trial on the facts of this case	18
A. In *Milanovich*, the crimes were separate transactions established with separate evidence; here, there is but a single transaction	22
B. The common law establishes a rule of priority that applies to the instant case but not to a case like *Milanovich*	25
II. If *Milanovich* requires a second trial of respondents, then *Milanovich* should be overruled	29
A. There is no need to instruct a jury that it can convict of robbery, or of possession, but not of both	30
1. The either/or instruction misinforms a jury about the law's commands and creates unnecessary risks of freeing guilty individuals	30
2. The jury should be informed of the elements of each offense and allowed to return a verdict on the facts presented	33
B. A new trial is not necessary to rectify the omission of a required either/or instruction	36
1. New trials should not be ordered unless they are necessary to cure errors that resist alternative solutions	37

589-467—75——1

Argument—Continued
II.—Continued
B.—Continued
2. Failure to give an either/or instruction can be rectified by vacating the surplus conviction ... Page 39
3. The reasons adduced in *Milanovich* to support a second trial do not withstand scrutiny ... 41
III. If respondents must be tried again, the new trial should be limited to the question of which crime they committed ... 48
Conclusion ... 57
Appendix ... 59

CITATIONS

Cases:

Allison v. *United States*, 409 F. 2d 445 ... 43
Andres v. *United States*, 333 U.S. 740 ... 35
Ashe v. *Swenson*, 397 U.S. 436 ... 56
Barnes v. *United States*, 412 U.S. 837 ... 43
Benton v. *Maryland*, 395 U.S. 784 ... 43
Berra v. *United States*, 351 U.S. 131 ... 35, 46
Bruton v. *United States*, 391 U.S. 123 ... 44
Bryan v. *United States*, 338 U.S. 552 ... 53–54
Cannon v. *State*, 289 So. 2d 445 ... 36
Commonwealth v. *Obshatkin*, 307 N.E. 2d 341 ... 36
Donnelly v. *DeChristoforo*, 416 U.S. 637 ... 37
Duncan v. *Louisiana*, 391 U.S. 145 ... 13, 45
Dunn v. *United States*, 284 U.S. 390 ... 44
Emich Motors Corp. v. *General Motors Corp.*, 340 U.S. 558 ... 56
Ethridge v. *United States*, 494 F. 2d 351, certiorari denied, 419 U.S. 1025 ... 17
Fuller v. *United States*, 407 F. 2d 1199, certiorari denied, 393 U.S. 1120 ... 42, 46, 48
Gasoline Products Co. v. *Champlin Refining Co.*, 283 U.S. 494 ... 50, 51
Gossett v. *State*, 224 Tenn. 374, 455 S.W. 2d 585 ... 29, 36
Gentry v. *United States*, 386 F. Supp. 1126 ... 16, 17

Cases—Continued

Page
Glass v. *United States*, 351 F. 2d 678 ... 17
Gorman v. *United States*, 456 F. 2d 1258 ... 33
Green v. *United States*, 355 U.S. 184 ... 31
Green v. *United States*, 365 U.S. 301 ... 40–41
Hamling v. *United States*, 418 U.S. 87 ... 39, 44
Harrington v. *California*, 395 U.S. 250 ... 39
Heflin v. *United States*, 358 U.S. 415 ... *passim*
Hernandez-Uribe v. *United States*, 515 F. 2d 20 ... 56
Holiday v. *Johnston*, 313 U.S. 342 ... 6
Keating v. *United States*, 413 F. 2d 1028 ... 17
Keeble v. *United States*, 412 U.S. 205 ... 46, 47
Kelly v. *United States*, 370 F. 2d 227, certiorari denied, 388 U.S. 913 ... 47
Lindsey v. *Commonwealth*, 383 S.W. 2d 333 ... 36
Lutwak v. *United States*, 344 U.S. 604 ... 39
McGautha v. *California*, 402 U.S. 183 ... 45, 54
Mercer v. *Commonwealth*, 330 S.W. 2d 734 ... 29, 36
Milanovich v. *United States*, 365 U.S. 551 ... *passim*
Murphy v. *Florida*, No. 74–5116, decided June 16, 1975 ... 44, 45
O'Clair v. *United States*, 470 F. 2d 1199, certiorari denied, 412 U.S. 921 ... 33
Pena-Cabanillas v. *United States*, 394 F. 2d 785 ... 56
People v. *Colon*, 28 N.Y. 2d 1, 318 N.Y.S. 2d 929, 267 N.E. 2d 577, certiorari denied, 402 U.S. 905 ... 29, 36, 40
People v. *Daghita*, 301 N.Y. 233, 93 N.E. 2d 649 ... 29, 36, 40
People v. *Lamirato*, 180 Colo, 250, 504 P. 2d 661 ... 29, 36
People v. *Perez*, 40 Cal. App. 3d 795, 115 Cal. Rptr. 405 ... 27–28, 36
Phillips v. *United States*, C.A. 4, No. 73–2516, decided June 3, 1975 ... 18, 27
Prince v. *United States*, 352 U.S. 322 ... 6, 12, 31
Sansone v. *United States*, 380 U.S. 343 ... 35, 46
Shepp v. *State*, 484 P. 2d 563 ... 27, 36, 40
Sparf v. *United States*, 156 U.S. 51 ... 46
State v. *Botta*, 27 Ohio St. 2d 196, 271 N.E. 2d 776 ... 29, 35, 36
State v. *Fioravanti*, 46 N.J. 109, 215 A. 2d 16 ... 29, 36, 40
State v. *Flint*, 4 Wash. App. 545, 483 P. 2d 170 ... 29, 36
State v. *Houston*, 211 N.W. 2d 598 ... 36

Cases—Continued

	Page
State v. *Koton*, 202 S.E. 2d 823	27, 36, 40
State v. *Sargood*, 80 Vt. 412, 68A.51	56
State v. *Tritz*, 522 P.2d 603	36
Thomas v. *United States*, 418 F.2d 567	17
United States v. *Abercrombie*, 480 F.2d 961, certiorari denied, 414 U.S. 1008	6, 16, 17
United States v. *Colacurcio*, 514 F.2d 1	56
United States v. *Corson*, 449 F.2d 544	33
United States v. *Dixon*, 507 F.2d 683, petition for a writ of certiorari pending, No. 74-5869	16, 17
United States v. *Dotterweich*, 320 U.S. 277	44
United States v. *Faleafine*, 492 F.2d 18	33
United States v. *Fleming*, 504 F.2d 1045	33
United States v. *Harris*, 346 F.2d 182	17
United States v. *Jones*, 418 F.2d 818	17
United States v. *Markis*, 352 F.2d 860	47
United States v. *Neighbors*, C.A. 8, No. 74-1616, decided May 14, 1975	18
United States v. *Oppenheimer*, 242 U.S. 85	56
United States v. *Ploof*, 464 F.2d 116	18
United States v. *Rangel-Perez*, 179 F. Supp. 619	56
United States v. *Roach*, 321 F.2d 1	17
United States v. *Sellers*, C.A. 4, No. 74-1683, decided April 10, 1975, petitions for writs of certiorari pending, Nos. 74-1476 and 74-6503	16, 17, 18
United States v. *Sharpe*, 452 F.2d 1117	17, 27
United States v. *Tyler*, 466 F.2d 920, certiorari denied, 409 U.S. 1045	16
United States v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186	55
United States v. *Van Sirrs*, 434 F.2d 1026	55
United States v. *Wright*, 511 F. 2d 1311	52
Wells v. *State*, 127 Ga. App. 109, 192 S.E. 2d 567	29, 36
Whalem v. *United States*, 346 F. 2d 812, certiorari denied, 382 U.S. 862	52
Yates v. *Dann*, 11 F.R.D. 386	53
Young v. *United States*, 309 F. 2d 662	46
Constitution:	
United States Constitution:	
Fifth Amendment	39, 49
Sixth Amendment	13

	Page
Statutes:	
Antihijacking Act of 1974, Pub. L. 93-366, 88 Stat. 409, 411, adding 49 U.S.C. 1473(c)(2)(B)(iii)	54-55
18 U.S.C. 2	27
18 U.S.C. 641	7, 16
18 U.S.C. 2113	2, 9, 31, 33, 40, 42, 59
18 U.S.C. 2113(a)	4, 5, 6, 41, 59
18 U.S.C. 2113(c)	4, 5, 6, 7, 21, 26, 60
18 U.S.C. 2113(d)	4, 5, 6, 24, 41, 60
28 U.S.C. 2106	53
28 U.S.C. 2255	22
Rules:	
Fed. R. Civ. P. 59	50, 53
Fed. R. Crim. P. 35	22, 25
Fed. R. Crim. P. 52(a)	39
Fed. R. Evid. 804(b)(1)	39
Miscellaneous:	
Annotation, 136 A.L.R. 1087 (1942)	26
10 Halsbury, *Laws of England* (Simonds ed. 1955)	26, 28
Kalven & Zeisel, *The American Jury* (1966)	45
6A Moore's *Federal Practice* (1974)	51
Vestal and Coughenour, *Preclusion/Res Judicata Variables. Criminal Prosecutions*, 19 Vand. L. Rev. 683 (1966)	56
2 Wharton, *Criminal Law and Procedure* (Anderson ed. 1957)	26, 28

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1141

UNITED STATES OF AMERICA, PETITIONER

v.

BOBBY GENE GADDIS AND BILLY SUNDAY BIRT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 506 F. 2d 352.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1975 (Pet. App. B). By order of February 3, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 10, 1975. The petition was filed on that date and was granted on May 27, 1975 (A. 26). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether *Milanovich* v. *United States*, 365 U.S. 551, always requires a new trial when a defendant is convicted of the mutually exclusive offenses of bank robbery and possession of the proceeds of that robbery and, if it does so require, whether it should be overruled.

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, is set forth in the Appendix to this brief, *infra*, pp. 59–61.

STATEMENT

On February 25, 1974, respondents met Billy Wayne Davis at a truck stop in Winder, Georgia (Tr. 160–161, 243–244). Davis requested a sum of money that respondent Birt owed him (Tr. 160–161). Birt replied that he had no money but that there was a bank in Loganville, Georgia, which he thought could be robbed easily because the town had but one police officer (Tr. 161). After further discussion, respondents drove with Davis to Loganville to observe the bank (Tr. 162–163); they returned for additional observation each of the next two days (Tr. 166).

On February 28, 1974, respondents stole a Ford station wagon and a Ford sedan, which they intended to use in the robbery and the planned escape from Loganville to Winder (Tr. 166–168). During the morning of March 6, 1974, the trio drove to Loganville in three separate cars (Tr. 172). Respondent Gaddis drove his own car and parked it on a back road leading to Winder (Tr. 169, 172). The stolen Ford sedan

was left in a church parking lot on the main highway from Loganville to Winder (Tr. 169, 172). Armed with an assortment of handguns, a rifle and a double-barreled shotgun, the three drove into Loganville in the stolen Ford station wagon (Tr. 169–170, 172–174).[1]

After ascertaining the whereabouts of William Cody, Loganville's lone police officer, Davis and respondent Birt donned ski masks and gloves (Tr. 66, 173). Respondent Gaddis, wearing a long black wig (Tr. 173), drove them to an area behind the bank and parked the car (Tr. 174). Gaddis remained in the car while Davis and Birt, brandishing pistols, entered the bank (Tr. 174). Davis ordered everyone to lie on the floor while Birt looted the cashiers' drawers (Tr. 175–176). On a pre-arranged signal the two returned to the station wagon with $7,501.73 in cash and prepared to flee (Tr. 105, 176).

Alerted by police radio that the bank alarm had sounded, officer Cody drove to the scene of the crime (Tr. 67–68). When Cody approached the bank, respondent Gaddis fired the shotgun, striking the window on the right front door of the police car and wounding the officer in the face (Tr. 67–68, 75, 177). As the robbers drove off, respondent Birt fired a rifle at Cody, who lay on the ground near his car (Tr. 69, 177). Birt asked Gaddis to stop the car so that he could "have it out with the police" (Tr. 177). Gaddis

[1] Respondents had followed this same procedure, with the intention of robbing the bank, on both March 2 and 5. Because of various circumstances, however, they had not put their plan into action (Tr. 168–172).

589-467—75——3

BEST COPY AVAILABLE

did not stop; he drove to the places where the cars had been left. The robbers retrieved and abandoned the cars in turn, ending with the car owned by Gaddis. The robbers finally divided the proceeds of the robbery equally (Tr. 178–180).

After receiving part of her husband's share of the proceeds, Davis's wife deposited several hundred dollars of this money in a bank in Toccoa, Georgia on March 8, 1974 (Tr. 114–115, 145). The deposit included "bait" money stolen in the robbery; the Toccoa bank notified the Federal Bureau of Investigation. An agent visited the Davis home and found additional "bait" money in a freezer (Tr. 135). Davis testified for the government at trial.[2]

A grand jury returned an eight-count indictment (A. 7–11) charging respondents and Davis with entering a federally-insured bank with intent to rob it by force and violence (Count 1) and robbing the bank by force and violence (Count 2), in violation of 18 U.S.C. 2113(a); with possessing the funds stolen in the robbery (Count 3), in violation of 18 U.S.C. 2113(c); and with assaulting four people with dangerous weapons during the course of the robbery (Counts 4 to 8), in violation of 18 U.S.C. 2113(d).

The evidence introduced at trial demonstrated that both respondents obtained their share of the proceeds by direct participation in the robbery. There was no evidence that either respondent received or possessed the proceeds in any other way; indeed, there was no

[2] Davis pleaded guilty prior to trial. He was sentenced to a term of 20 years' imprisonment.

evidence that the robbers even passed the proceeds among each other, except for the initial division.

The district court instructed the jury that the bank robbery statute, "read in a common sense fashion, makes each and every phase of the robbery of a bank * * * a crime" (A. 14). The court discussed the elements of the relevant portions of the statute. During its explanation of subsection (a), the court observed that "we have in that subsection two different crimes already" (*ibid.*). The jury then was instructed (A. 14–15) that subsection (c) provides that

> whoever receives, possesses, conceals, stores, barters, sells, or disposes of any money that is taken in violation of this law, knowing it to have been taken from a bank, is guilty of a crime. Another crime—a separate crime.

After its initial explanation of the elements of subsection (d), which punishes assaults committed during a bank robbery, the court stated (A. 15):

> So that's another crime against the United States. So you see, it's like turning on a water hose and the water flows. In this case Congress has by law determined that there are a series of crimes that can be committed—separate crimes—in the course of robbing a bank.

The court did not instruct the jury that conviction on the robbery counts would preclude conviction on the possession count, or that the crime of possession created by Section 2113(c) was directed against a class of offenders other than those who had participated in the robbery itself. Following its charge to the jury, the court asked for exceptions or additions to the

charge. Counsel for respondents neither objected nor offered additional instructions (A. 22–23).

The jury convicted both respondent on all counts (A. 23). At sentencing, the court remarked upon the serious nature of respondents' crimes and imposed on each respondent terms of 20 years' imprisonment for aggravated bank robbery (2113(a)), 25 years' imprisonment for assault in the course of the bank robbery (2113(d)), and 10 years' imprisonment for possession of the proceeds (2113(c)), all sentences to run concurrently (A. 25). The trial judge stated (*ibid.*):

> [T]he court realizes that twenty-five years is the maximum, and the cases say that there is a merger of all of those offenses. If there is any question as to the legality of that sentence, that's the Court's intention.

The court of appeals reversed (Pet. App. A). Although respondents had not objected to the instructions, the court held that it was plain error to permit the jury to convict of both taking and possessing the proceeds of the same bank robbery. Relying on *Milanovich* v. *United States,* 365 U.S. 551, and *United States* v. *Abercrombie,* 480 F.2d 961 (C.A. 5), certiorari denied, 414 U.S. 1008, the court went on to hold that, because there were no means for determining what verdict a properly instructed jury would have returned, and because the jury's verdict was inconsistent, "the proper appellate remedy is to remand for a new trial" (Pet. App. 18).

SUMMARY OF ARGUMENT

In *Holiday* v. *Johnston,* 313 U.S. 342, and *Prince* v. *United States,* 352 U.S. 322, the Court held that

various combinations of subsections of the federal bank robbery act state simply different degrees of the crime of bank robbery. The Court has recognized one exception to this rule: subsection (c), which forbids possession of proceeds taken in the robbery, creates a separate offense "for those who receive the loot from the robber" (*Heflin* v. *United States,* 358 U.S. 415, 419).

Respondents were charged both with several degrees of bank robbery and with possession of the proceeds. The district court instructed the jury that each subsection creates a separate offense, and the jury convicted on all counts. The court then treated all counts as "merged" and gave a general sentence. The court of appeals thought that the multiple conviction could be rectified only by a new trial; it relied for this proposition upon *Milanovich* v. *United States,* 365 U.S. 551.

Milanovich dealt with convictions for larceny and receiving the proceeds (both in violation of 18 U.S.C. 641). The larceny count and the receiving count serve roles corresponding to the robbery and possession subsections of the bank robbery statute, as *Milanovich* itself held (365 U.S. at 554). This Court held in *Milanovich* that, at least on the facts before it, the trial judge should have instructed the jury that it could convict of either the larceny or the receipt of the proceeds, but not of both. Because the court did not so charge, the jury returned the "inconsistent" verdicts of guilty on both counts; this Court held that the proper remedy was to remand for a new trial at which the jury would be given proper instructions.

I

Milanovich involved facts different from those of the instant case, and, we submit, it does not control here. In *Milanovich,* the evidence adduced at trial demonstrated (if believed by the jury) that Mrs. Milanovich was a passenger in what was to be used as the getaway car in a larceny. The getaway car left prematurely. Seventeen days later Mrs. Milanovich retrieved the loot from its hiding place. These were two independent transactions proved at trial with independent evidence. It would have been quite possible for the jury to conclude that she had engaged in one transaction but not the other.

The Court held that, as a matter of statutory construction, Mrs. Milanovich could not be punished for both offenses. At the same time, however, the Court concluded that the jury should be accorded essentially unguided discretion to choose between these possible offenses. Because, in light of this discretion, an appellate court could not tell which offense a properly instructed jury would have selected, the Court remanded for a second trial at which a new jury would be given the opportunity to choose.

By contrast, all of the evidence introduced at respondents' trial demonstrated (if believed by the jury) that respondents had perpetrated the robbery and escaped with the proceeds. The evidence established but a single transaction; there was no proof that respondents had possessed the proceeds at any later date. On these facts the jury had no discretion to exercise. If the jury that tried respondents had concluded that they did not commit the robbery, there would have been insufficient evidence to convict them of possession, and the jury would have been required by the instructions to acquit them of all charges. On the other hand, if the jury had concluded (as it did) that respondents were the robbers, then any separate conviction for possession would be precluded by the federal bank robbery act itself; the legislative history of Section 2113, as interpreted in *Heflin,* indicates that Congress has not authorized cumulative punishments for those who have been convicted of bank robbery. No matter how this case is approached, then, respondents' conviction for possession would have been improper, and speculation into the jury's deliberations unnecessary. The correct remedy is to vacate the surplus conviction.

This argument is supported by the common law treatment of the relationship between theft crimes and possession crimes. At common law, an individual who did not participate in the robbery proper could be convicted of both robbery (as an accomplice) and any subsequent possession. Because the punishments could be cumulative, there was no priority of consideration between the offenses. On the other hand, the robber himself could not be punished for possession of his booty as a separate offense; if he was convicted of both crimes, courts affirmed the robbery conviction and vacated the possession conviction.

Milanovich was a case of the former type; Mrs. Milanovich had not participated in the larceny itself. The Court rejected the common law rule that would have permitted double conviction and cumulative

punishment. Having done so, it was left without a rule of priority between offenses; rather than establishing such a rule, it left to the jury's discretion the question whether Mrs. Milanovich should be convicted of larceny or of receipt. However, the common law does provide a rule of priority in cases like the instant one, where the defendant participated in the robbery as a principal, and the Court should adopt it. If the jury has found an individual guilty of the robbery itself, it should convict on that count. A district court or an appellate court can achieve the same end when the jury has rendered verdicts of guilty of both offenses by vacating the subordinate possession conviction, and there is no need for a second trial.

II

If the Court should conclude that *Milanovich,* if followed, requires retrial in *all* cases of conviction of both theft and possession of the proceeds thereof, it will be necessary for the Court to consider whether *Milanovich* should be overruled. We submit that it should.

A. *Milanovich* held that the jury should be told that it can convict of either larceny or receipt but not of both. However, this "either/or" instruction creates two important problems. First, it does not inform the jury which of the two offenses it should initially consider; *Heflin* and the legislative policy *Heflin* reflects indicate that it should consider robbery first. Second, the either/or instruction creates nagging double jeopardy problems. It tells the jury to "acquit," or simply fail to return a verdict, on one of the counts. If the

charge on which the defendant is convicted later is (for reasons that would not infect a conviction for the other offense) reversed on direct appeal or vacated on collateral attack, or if a new trial is granted because of newly-discovered evidence bearing only on the count selected by the jury for conviction, it may be difficult if not impossible to retry the defendant for the other offense. Thus, even if the evidence would fully support a possession conviction, the jury's "acquittal" (actual or constructive) on that count, resulting from its selection of the robbery count, could block further prosecution. A jury instruction that could operate to prevent a guilty individual from being punished should be avoided whenever possible.

What is more, the either/or instruction is not addressed to the problem identified by *Heflin*—the need to prevent cumulative punishment of those who have committed but a single offense. The problem of cumulative punishment can be dealt with adequately by the judge. It is possible for an individual, during the course of a single criminal transaction, to violate many of the sections of the federal bank robbery act. None of the interests articulated in *Heflin* are jeopardized by allowing the jury to fulfill its usual role of determining whether, beyond a reasonable doubt, an accused committed the acts that would violate any given subsection.

The jury should be allowed to return a verdict concerning each set of facts alleged to constitute an offense; only in this way can we be sure how it evaluated the facts. Moreover, this practice carries no perceptible costs. The circumstances of theft/posses-

589-467—75——2

sion cases are such that it is hard to see how any of the jury's verdicts could "infect" another verdict; there is thus no reason to suppose that allowing a jury to return a verdict, even on a count that turns out (in light of other verdicts) to have been irrelevant or superfluous, will produce erroneous verdicts on any other count.

Once the jury has returned its verdicts, the judge can enter judgments according to the bank robbery act. For example, when the jury returns verdicts of guilty of both robbery and assault during the course of a robbery, the trial judge, following *Prince*, should enter a single judgment, treating the offenses as merged. It is not necessary to tell the jury that the offenses *will* merge, for the judge can accomplish that result. Similarly, because under *Heflin* the offense of possession is committed only by one who receives the loot from the robber, when the jury convicts of both robbery and possession the judge should enter a single judgment of conviction for robbery, in accordance with the rule of priority.

B. Even if an either/or instruction should be given, it does not follow that a new trial automatically must be used as a remedy. The district court or an appellate court can apply the *Heflin* rule and vacate any judgment convicting a robber of possession. This will eliminate both multiple convictions and the possibility of cumulative punishment; a remand for resentencing (when necessary) will allow the district court to enter the appropriate sentence.

Because any error in neglecting to give the jury an either/or instruction can be so easily, and so completely, rectified, a new trial is unnecessary. It is also undesirable; new trials are costly to the defendant, to the government, and to the system of justice itself. They are rightly used only when an error at trial has prevented an accused from receiving a fair trial, and the absence of an either/or instruction does not imperil such an interest or give rise to a suspicion that the jury's conclusion that a defendant has committed the acts alleged is anything other than accurate.

The *Milanovich* Court did not consider the costs of second trials. It did, however, advance several reasons for requiring a new trial, including that inconsistent verdicts were impermissible and that a properly instructed jury might have acquitted altogether. But the verdicts are not factually inconsistent; in any event, in a long line of cases—none of them adverted to in *Milanovich*—this Court has held that verdicts are not defective simply because they are inconsistent. And the idea that a jury convinced beyond a reasonable doubt that an accused had both robbed a bank and possessed the proceeds would, if instructed that it could convict of but one of these offenses, decide to acquit of both, attributes to the jury a degree of illogic unknown to our law. When this Court held that the Sixth Amendment right to trial by jury applies to the States, it forcefully pointed out that the system of trial by jury is undergirded by a belief that juries, perhaps more so than judges, can be relied upon to decide controversies fairly, reasonably, conscientiously and intelligently. *Duncan* v. *Louisiana*, 391 U.S. 145, 147.

We submit that, upon reexamination, the Court should conclude that the arguments supporting the result in *Milanovich* are contrary to principles accepted elsewhere in the criminal law. The case should be overruled.

III

If, in spite of the arguments we have advanced above, the Court should conclude that the respondents must be tried a second time, we respectfully request it to make clear what issues are open on that retrial.

This is not an ordinary criminal case in which errors committed during trial have infected the fact-finding process. The lack of an either/or instruction creates no reason to doubt the accuracy of the jury's verdict that, beyond a reasonable doubt, respondents committed the acts alleged in the indictments. The only problem presented by this case is that the jury was not asked to express a preference between offenses.

We submit that this statement of the flaw suggests the scope of the remand: the jury should be told, at the second trial, that a previous jury already has determined that respondents are guilty, and that its only task is to select the crime on which respondents shall stand convicted. In other words, the option of absolute acquittal on all charges should not be accorded the second jury.

Although this may seem an unusual procedure to follow in criminal cases, it is unusual only because almost all reversals in criminal cases occur in response to errors that could have affected the jury's

fact-finding decisions. This error does not. The procedure we seek is similar to that used in civil cases in which an appellate court concludes that the jury was improperly instructed on the question of damages (the remedy). Such cases are routinely returned to the district court for a second trial confined to the question of damages—the second jury is instructed to accept as given the first jury's verdict on liability. Here, too, the jury has been improperly instructed only on the question of what it should do with the facts it finds. The terms of remand should be the same—a second trial limited to the question of the judgment to be entered, at which the issue of liability is accepted as settled by the first jury. There is neither justification nor occasion for providing to respondents the possibility of a windfall acquittal because, during the interim between trials, evidence may have dissipated or memories dimmed. Respondents have had a fair trial at which the prosecution convinced a jury of their guilt; there is no need to put that same question to another jury.

ARGUMENT

The court of appeals has decided that respondents must be tried a second time because the jury at their first trial was not informed that it could convict them either of bank robbery or of possession of the proceeds, but not of both crimes. The court relied upon *Milanovich* v. *United States,* 365 U.S. 551, in support of its decision.

Several premises underlie the holding of the court of appeals. The first is that *Milanovich,* which dealt

with a larceny statute (18 U.S.C. 641), applies to violations of the federal bank robbery act. The court of appeals, following *United States* v. *Abercrombie,* 480 F. 2d 961 (C.A. 5), certiorari denied, 414 U.S. 1008 held that it does. We agree with this proposition.[3] The two sets of crimes are functionally interchangeable for *Milanovich* purposes; larceny bears the same relation to receipt of the proceeds as does bank robbery to possession of the proceeds. Indeed, *Milanovich* itself so recognized (365 U.S. at 554). For purposes of this brief, therefore, we shall treat *Milanovich* as if the Court had dealt directly with the federal bank robbery act.

The court of appeals' second proposition was that *Milanovich* required reversal on the facts before it. For the reasons we discuss below, this proposition is incorrect; *Milanovich* should be applied only to those cases in which a jury may properly be accorded unguided discretion to choose between offenses charged. Where, as here, the evidence introduced at trial shows but a single criminal transaction and there is no independent evidence of possession, the jury should not have this discretion. The proper remedy is to vacate

[3] *United States* v. *Tyler*, 466 F. 2d 920 (C.A. 9), certiorari denied, 409 U.S. 1045, and *Gentry* v. *United States*, 386 F. Supp. 1126 (E.D. Tenn.), hold that *Milanovich* is confined to violations of Section 641. Other courts to consider the question have held otherwise, and several have expressly rejected the *Tyler* approach. See, *e.g.*, *United States* v. *Sellers*, C.A. 4, No. 74-1683, decided April 10, 1975, petitions for writs of certiorari pending, Nos. 74-1476 and 74-6503; *Abercrombie*, *supra*. But cf. *United States* v. *Dixon*, 507 F. 2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869.

the conviction for possession and to leave the robbery conviction undisturbed.

The third principle supporting the decision below is one beyond the control of the court of appeals—that court assumed, as was required, that *Milanovich* still is good law. We respectfully submit that *Milanovich* was decided incorrectly and urge that it be overruled in its entirety, both to clear away the tangled webs spun by courts attempting to adhere to its dictates and to bring the law of bank robbery into accord with principles that prevail elsewhere in the criminal law.[4]

[4] The lower courts have adopted a variety of conflicting approaches to the problems presented by *Milanovich*. In the Fifth Circuit, a new trial is required whenever the jury is not told that it must not convict of both possession and the robbery itself. *E.g.*, *Abercrombie*, *supra*; *Thomas* v. *United States*, 418 F.2d 567 (C.A. 5); see *United States* v. *Jones*, 418 F.2d 818 (C.A. 8). The Fourth Circuit recently rejected this view (which it had previously adopted. *United States* v. *Harris*, 346 F.2d 182) in *United States* v. *Sellers*, *supra*.

Other courts have held that when the sentences under the robbery and possession counts are concurrent and of equal length, further inquiry into the charge to the jury is unnecessary. See, *e.g.*, *Ethridge* v. *United States*, 494 F.2d 351 (C.A. 6), certiorari denied, 419 U.S. 1025; *Gentry* v. *United States*, *supra*. But this approach has been expressly rejected by *Glass* v. *United States*, 351 F.2d 678 (C.A. 10), and *United States* v. *Roach*, 321 F.2d 1 (C.A. 3), both of which hold that a new trial is required on all counts because, if a properly instructed jury had returned a different verdict, a different sentence might have been imposed. See also *Keating* v. *United States*, 413 F.2d 1028 (C.A. 9).

Another line of cases holds that, regardless of the instructions given to the jury, if that jury convicts of robbery or possession, but not both, a new trial is not required. See, *e.g.*, *United States* v. *Dixon*, 507 F.2d 683 (C.A. 8), petition for a writ of certiorari pending, No. 74-5869; *United States* v. *Sharpe*, 452 F.2d 1117, 1119 (C.A. 1); *United States* v. *Ploof*, 464

I

THE *MILANOVICH* DECISION DOES NOT REQUIRE A NEW TRIAL ON THE FACTS OF THIS CASE

A close examination of *Milanovich* leads to the conclusion that the reinstatement of respondents' robbery convictions would not be inconsistent with that case. In *Milanovich* the defendants (husband and wife) drove three confederates by car to a United States Naval Commissary, the site of a planned theft, and (according to plan) were to wait outside for the return of their accomplices after the theft was accomplished. After a short wait the defendants became frightened and left prematurely. When their accomplices discovered that the getaway car had left without them, they buried the loot. Seventeen days later, Mrs. Milanovich retrieved the buried money, which federal agents subsequently discovered during a search of her house.

Both defendants were convicted of larceny; the trial judge acquitted Mr. Milanovich with respect to the receiving count but allowed the jury to convict Mrs. Milanovich of receiving and concealing the pro-

F.2d 116 (C.A. 2) (by implication); cf. *United States* v. *Neighbors*, C.A. 8, No. 74–1616, decided May 14, 1975.

Finally, one case now has raised the possibility that an individual accused of possession of the proceeds can defend by claiming that he is, in fact, a robber. *Phillips* v. *United States*, C.A. 4, No. 73–2516, decided June 3, 1975 (*en banc*). But see *Sharpe*, *supra*.

We are furnishing to counsel for respondents a copy of our petition in *Sellers*. We are preparing a petition for a writ of certiorari in *Phillips* and will furnish counsel for respondents with a copy when it is filed.

ceeds. The district court sentenced Mr. Milanovich to a term of five years' imprisonment for larceny; Mrs. Milanovich received concurrent terms of five years' imprisonment for receipt of the proceeds and ten years' imprisonment for larceny. Relying on *Heflin*, the court of appeals vacated Mrs. Milanovich's conviction for receipt of the proceeds.

In a five-to-four decision, this Court agreed that the *Heflin* principle applied to the larceny statute and precluded the conviction for both larceny and receipt. The Court went on to hold that the proper remedy was not simply to vacate one of the sentences but to remand Mrs. Milanovich's case for a new trial on both counts. The majority opinion first emphasized that, contrary to the government's assertions, defense counsel had adequately made clear, during the trial, its position that a thief could not be convicted of receiving from himself (365 U.S. at 552–553). Then, after finding that "the evidence was sufficient to support a conviction for either larceny or receiving" (365 U.S. at 554), the Court explained why a new trial was necessary (*id.* at 555–556):

> Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed upon the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any

> prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict of guilty on the larceny count, and that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

The most important predicate for the decision in *Milanovich* was, apparently, that neither of the offenses Mrs. Milanovich had committed could be given priority over the other. The Court presumably would not have concluded that vacating one of the convictions would usurp the role of the jury or require speculation into its conduct if the jury had no discretion in its actions. In other words, if some rule creates a priority of consideration between two offenses submitted to a jury, requiring the jury to turn its attention to one of them first, it would be a simple matter for a court to affirm by enforcing the jury's conviction on the "first priority" offense and vacating the other conviction. For example, when a jury erroneously is allowed to convict of both a greater and a lesser included offense, a reviewing court routinely vacates the conviction for the lesser offense and allows the conviction on the greater to stand.[5] This function neither usurps the jury's discretion—properly instructed it would have had none to exercise—nor involves speculation into the jury's resolution of disputed facts, for the jury already has

[5] A more complete discussion of the law of lesser included offenses appears at pages 42–43, 45–47, *infra*.

resolved the facts and presented its verdicts. Because *Milanovich* did not follow this well-beaten path of vacating one of the two convictions, we infer that the Court must implicitly have held that there was no priority of consideration between Mrs. Milanovich's crimes.[6]

This lack of priority is apparently at odds with *Heflin* v. *United States*, 358 U.S. 415, which held that "subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber. We find no purpose of Congress to pyramid penalties for lesser offenses following the robbery. * * * [W]e think Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the bank robbers themselves" (358 U.S. at 419–420). The *Heflin* Court, dealing directly with offenders who (like respondents) actively participated in the robbery, recognized that subsection (c) reaches only those "who receive the loot from the robber." We think this language, when read in context and in light of the near-universal rule that the offense with the higher authorized penalty is established as the offense to receive priority of consideration, extends such priority to the offense of robbery; only an accused who has been convicted of robbery is incapable of committing the offense of possession of the proceeds. The Court's action accorded with its words;

[6] This conclusion is reinforced by the fact that the Court reached its decision in the face of the specific complaint in the dissenting opinion of Mr. Justice Clark that "the jury is invited to consider counts not factually inconsistent, and in such sequence as it chooses, with no more reason to convict on one rather than another * * *." 365 U.S. at 564.

it vacated Heflin's conviction for possession and left standing his conviction and sentence for robbery of the bank.[7]

We suggest, therefore, that if there had been a rule of priority between Mrs. Milanovich's offenses, a second trial would have been unnecessary. The case is distinguishable on that ground: There is (or should be) a priority between respondents' offenses.

A. IN *MILANOVICH*, THE CRIMES WERE SEPARATE TRANSACTIONS ESTABLISHED WITH SEPARATE EVIDENCE; HERE, THERE IS BUT A SINGLE TRANSACTION

Milanovich did not deal with a case like the present one. Mrs. Milanovich was tried and convicted of two separate offenses (her presence in the getway car, and the subsequent exhumation of the proceeds); the offenses were distinct in time (17 days apart) and were proved at trial by discrete evidence. None of the

[7] *Milanovich* suggested (365 U.S. at 555) that the *Heflin* Court selected this remedy because of the limits imposed by Fed. R. Crim. P. 35. We do not think that this affects our discussion of *Heflin*. The Court proceeded under Rule 35 only because a majority of the Court did not believe that 28 U.S.C. 2255 could provide relief from a sentence to be served in the future. (That portion of *Heflin* was overruled by *Peyton* v. *Rowe*, 391 U.S. 54.) But *Heflin* was before the Court under Section 2255, and Heflin was serving his sentence for robbery; the Court could, if it wished, have set aside his robbery sentence and affirmed his sentence for possession. Alternatively, it could have set aside his sentence for robbery under Section 2255 and his sentence for possession under Rule 35 and required the government to retry Heflin or free him. Finally, even if it is not possible to infer a rule of priority from the remedy selected in *Heflin*, the language of *Heflin* and the legislative policy considerations on which it relies rather clearly suggest the same rule.

evidence establishing Mrs. Milanovich's presence at the getaway car established her part in the recovery of the loot, and vice versa. It would have been quite logical for the jury to have convicted her of both larceny and possession, of larceny alone, of receipt alone, or of neither on the facts presented, without the slightest factual inconsistency.

Here, by contrast, all of the evidence at trial went to respondents' participation in the robbery. There was no evidence that respondents possessed the proceeds other than during the robbery, the getaway, and the division of the loot. Respondents' shares—unlike Davis's share—were never located. The central, indeed, the exclusive, issue argued by counsel at trial was whether respondents participated in the bank robbery (Tr. 272–315). As both prosecution and defense counsel repeatedly stated (Tr. 283, 287, 288, 302, 308) the question the jury had to decide was whether respondents had been convincingly identified as the robbers of the bank.

If (as the jury determined) respondents are guilty as robbers, a jury properly instructed under *Heflin* would have convicted them of that crime. They stand so convicted and, because of that conviction, cannot also be found to have committed the crime of possession of the proceeds. Indeed, it would have been proper in this case, quite unlike the case in *Milanovich*, not to submit the possession count to the jury at all, for if the jury had concluded that respondents were not the robbers, there would have been no independent evidence from which the jury could have concluded that they possessed the proceeds at any time.

It would not have been logically possible for the jury to acquit respondents of robbery and to convict them of possession on the facts presented at trial.

Because *Milanovich* involved separate criminal transactions proved at trial with separate evidence, it was arguably appropriate for the Court implicitly to conclude that there was no priority between the offenses and to allow the jury to express a preference unbridled by rules of priority. But such an outcome is inappropriate where, as here, there was but a single criminal transaction and no separate evidence of possession. The Court should treat this case as if a count unsupported by the evidence (the possession count) had been submitted to the jury. In such cases the unsupported count is routinely vacated and the supported count affirmed; there is no presumption that one count affected the jury's consideration of another.[8]

[8] In certain instances there should perhaps be a remand for resentencing when an appellate court vacates a conviction for possession. Remand would appear to be unnecessary in this case, however, since the possession conviction plainly did not cause enhancement of the sentence. In addition to the single conviction of possession, respondents were convicted of seven counts of aggravated bank robbery. At sentencing, the district court observed (A. 25) that respondents' crime was "one of the most serious bank robberies that we've had, probably that we can ever have, where not only weapons were used by [sic] the life of a policeman is seriously endangered." The court therefore sentenced respondents to a term of 25 years' imprisonment, the maximum allowable when an assault is committed during the robbery, in violation of 18 U.S.C. 2113(d). It then stated that, according to case law, there was a "merger" of all offenses. The 25-year sentence was imposed because of the aggravated nature of the entire criminal transaction, and the possession conviction—which was not based on evidence of any additional offense or continuing attempts at concealment—was not a separate consideration in the mind of the court.

In *Milanovich*, by contrast, the Court noted (365 U.S. at 555–556) that the receipt conviction might have caused the trial judge to increase the punishment for larceny, which was "double the punishment that had been imposed upon the husband for the identical offense" (365 U.S. at 555).

As a practical matter, it would rarely make any difference whether or not there is a remand for resentencing in cases involving this particular problem. If the vacation of the possession count were a development that would lead the sentencing judge to impose a reduced sentence on remand, the judge presumably would by the same token grant such relief on a motion for a reduction of sentence pursuant to Fed. R. Crim. P. 35 even if the court of appeals did not remand for resentencing.

The same principle is supported by the concurrent sentence doctrine. This Court has been unwilling to assume that the submission of a bad count to a jury spoils the jury's verdict upon an otherwise proper count (see note 19, *infra*). The Court has, instead, limited its inquiry in most cases to the question whether the improper count has led to an increase in the sentence.

B. THE COMMON LAW ESTABLISHES A RULE OF PRIORITY THAT APPLIES TO THE INSTANT CASE BUT NOT TO A CASE LIKE *MILANOVICH*

We have argued above that the fact patterns of *Milanovich* and of this case are sufficiently unlike that the difference in facts justifies a difference in outcome. We now suggest that the disinclination of *Milanovich* to create a rule of preference between that defendant's offenses may have had its roots in the common law. If that is so, then the common law equally distinguishes this case from *Milanovich*, for when a robber (as distinct from an accomplice) is convicted of both robbery and the ensuing possession,

BEST COPY AVAILABLE

the accepted remedy is to set aside the possession conviction and allow the robbery conviction to stand.

At common law, larceny (or robbery) and receipt (or possession) of the proceeds were distinct crimes. An individual who did not participate in the asportation of the booty from the scene of the robbery could commit both crimes. The common law courts in England and in most States reasoned that one could be guilty of the crime of robbery (as an accomplice) without touching the proceeds; it followed, therefore, that it could be a separate crime to come into possession of and harbor what had been stolen. See, *e.g.*, the cases collected in 2 Wharton, *Criminal Law and Procedure* § 576 (Anderson ed. 1957); 10 Halsbury, *Laws of England* §§ 1565–1571 (Simonds ed. 1955); Annotation, 136 A.L.R. 1087, 1094–1104 (1942). Because conviction and punishment (even consecutive punishment) would lie for both crimes, there was no priority between them.

Under federal theft statutes, some of the common law principles were retained and some abandoned. In conformity with the common law practice, one involved in a robbery as a principal and so convicted could not also be punished as a receiver or possessor. And, as interpreted in *Heflin,* an accessory to the crime could be guilty either as a robber or as a possessor if he received the loot from the robber.[9] *Heflin*

[9] We do not imply, nor did *Heflin* hold, that an individual accused under Section 2113(c) can defend against that charge by claiming that he was, in fact, the robber. *Heflin* simply held that an individual cannot be convicted of both offenses, for that would multiply the punishment of the robber. However, a conviction for possession of the proceeds of the robbery recently

(as interpreted in ***Milanovich***) modified the common law rule, however, by holding that while an accessory to the theft could be convicted of either the theft or of the receipt of the proceeds, he could not be convicted of both crimes.

Milanovich thus disapproved the common law rule to the extent that rule would have allowed both of Mrs. Milanovich's convictions to stand. Having rejected that option, the Court was faced with the question of disposition. Had it recognized a principle of priority, it could have permitted the prime conviction to stand while vacating the secondary conviction. As we read ***Milanovich***, all the Court did was to decline to establish such a rule of priority; consequently, it remanded to allow a jury to express a preference.[10] That is the procedure used when an individual is convicted of being an accomplice to the theft and of subsequent receipt of the proceeds in the few States that permit conviction on only one count and at the same time have no preference rules. See ***Shepp*** v. ***State,*** 484 P.2d 563 (Nev. Sup. Ct.); ***State*** v. ***Koton,*** 202 S.E.2d 823 (W. Va. Sup. Ct.); ***People*** v. ***Perez,***

was reversed by the *en banc* Court of Appeals for the Fourth Circuit, with three judges subscribing to the theory that proof of participation in the robbery establishes a defense to a charge of possession of the proceeds. *Phillips* v. *United States*, *supra;* contra, *United States* v. *Sharpe*, *supra.*

[10] Of course, 18 U.S.C. 2 punishes accomplices as if they were principals. See *Milanovich*, *supra*, 365 U.S. at 554, n. 5. This does not detract from the fact that Mrs. Milanovich was an accomplice as that term is understood at common law; there is no reason why the common law rules should be affected simply because an accomplice is made liable to the same punishment as a principal.

589-467—75——5

40 Cal. App. 3d 795, 115 Cal. Rptr. 405. It arguably is especially appropriate where, as in *Milanovich,* the court imposed sentences of unequal length.

The result in *Milanovich* is thus most readily explicable in terms of that defendant's status as an accomplice rather than a principal in the theft. The accused thief cannot be convicted of both offenses, and there is a clear rule of priority—the first question to be answered is whether the accused stands convicted as a thief. If the answer is "yes," then it is impossible to convict him of possession of the proceeds. The rationale for this rule is quite straightforward. Theft cannot be completed without asportation of the proceeds, so that any thief who participates in the asportation necessarily possesses the proceeds at some time. To convict a thief of both the theft and the possession would be duplicitous. See, *e.g.,* Wharton, *supra;* Halsbury, *supra. Heflin* adopted this rule, although it derived the rule from the statute's legislative history rather than from the common law.

The remedy prescribed by the common law is the same as the remedy selected in *Heflin:* the conviction for possession is vacated and the conviction for robbery allowed to stand. Once the jury has concluded that the accused was a participant in the robbery, a separate sentence for possession is improper; but there is no need to remand for a new trial to achieve that result. *Milanovich* remanded for such a trial because it was difficult to ascertain which count a jury, given free choice, would have selected. There may have been "free choice" on the facts of *Milanovich* itself, but there is no comparable "free choice" when the accused

participated in the robbery itself; the jury's *only* choice, under proper instructions, would have been to convict of robbery.

The jury in this case, properly instructed concerning the elements of bank robbery, concluded that, beyond a reasonable doubt, respondents were robbers. Because of the distinctions discussed above between this case and *Milanovich,* the jury's verdict was sufficient to allow the district court or a court of appeals to apply the rule of priority drawn from the common law and articulated in *Heflin,* and thus to sustain the robbery conviction. State courts follow the same path. See, *e.g., State* v. *Fioravanti,* 46 N.J. 109, 215 A. 2d 16 (Weintraub, C. J.); *State* v. *Botta,* 27 Ohio St. 2d 196, 271 N.E. 2d 776; *People* v. *Daghita,* 301 N.Y. 223, 93 N.E. 2d 649 (Fuld J.); *People* v. *Colon,* 28 N.Y. 2d 1, 318 N.Y.S. 2d 929, 267 N.E. 2d 577, certiorari denied, 402 U.S. 905; *Gossett* v. *State,* 224 Tenn. 374, 455 S.W. 2d 585; *Mercer* v. *Commonwealth,* 330 S.W. 2d 734 (Ky. Sup. Ct.) (by implication); *Wells* v. *State,* 127 Ga. App. 109, 192 S.E. 2d 567; *People* v. *Lamirato,* 180 Colo. 250, 504 P. 2d 661; *State* v. *Flint,* 4 Wash. App. 545, 483 P. 2d 170.

II

IF *MILANOVICH* REQUIRES A SECOND TRIAL OF RESPONDENTS THEN *MILANOVICH* SHOULD BE OVERRULED

We have argued above that *Milanovich* governs only when the evidence discloses that the robbery and the possession arose out of two essentially unconnected transactions. This is not such a case. However, should

the Court disagree with the interpretation of *Milanovich* that we have offered above, we submit that it should reexamine and overrule that case. We begin our discussion of that possibility by analyzing the soundness of the "either/or" instruction itself. We then contend that, even if it is proper to give the instruction, failure to do so should not necessitate a retrial.

A. THERE IS NO NEED TO INSTRUCT A JURY THAT IT CAN CONVICT OF ROBBERY, OR OF POSSESSION, BUT NOT BOTH

1. *The either/or instruction misinforms a jury about the law's commands and creates unnecessary risks of freeing guilty individuals*

The either/or instruction has, as we see it, two important vices. On the one hand, it neglects to inform the jury about the priority rule created by *Heflin* and the common law; if any instruction in this form is to be given, it should be more complete. On the other hand, by informing the jury that it should acquit the accused on all alternative charges, it creates a distinct possibility that guilty individuals may escape punishment altogether. We expand upon these concerns below.

a. The either/or instruction, as formulated in *Milanovich,* gives to a jury essentially unguided discretion to convict of one offense or the other. Indeed, it was in large part just this supposed discretion that led the *Milanovich* Court to conclude that Mrs. Milanovich had to be retried. But neither *Heflin* nor the common law necessarily creates complete discretion, and, we submit, it is misleading for a district court to give an either/or instructon without indicating how the discretion is to be exercised. See *Milanovich, supra,* 365 U.S. at 564 (Clark, J., dissenting). The underlying principle that informed both *Prince* v. *United States,* 352 U.S. 322, and *Heflin* was the Court's conclusion that the various subsections of Section 2113 were not intended to and should not be allowed to turn the offense of bank robbery into multiple offenses, so that the punishment of a bank robber could be pyramided. It was in furtherance of this perceived legislative intent that *Heflin* held that one convicted as a robber cannot commit the crime of possession of the proceeds. Since it is the fact of conviction of robbery that supplies the predicate for insulating the defendant from punishment for possession of the proceeds, it would be more accurate, if any instruction of this or similar type is to be given to the jury, to inform the jury that its first inquiry ought to be "Is the accused a robber?" If the answer to that question is "yes" beyond a reasonable doubt, then and only then should the jury pretermit its consideration of the possession offense.

b. However, we believe that an either/or instruction, even as so modified, should be avoided. The either/or instruction, by its nature, requests the jury to return either a verdict of acquittal or no verdict (which may be a constructive acquittal)[11] on the counts on which it does not convict, even though on the evidence adduced at trial the defendant has engaged in all of the acts necessary to constitute both the crime of robbery and the crime of possession. If the conviction returned by the jury later is set aside on

[11] Cf. *Green* v. *United States*, 355 U.S. 184.

direct appeal or collateral attack on grounds that would not infect a conviction on the other count, it could be difficult if not impossible to hold a second trial on that count.

As a concrete example, suppose that an individual is charged with robbery and possession of the proceeds. Evidence introduced at trial demonstrates that he was caught red-handed with the loot several hours after the robbery, but that, because he was masked, no one present in the bank can identify him. Circumstantial evidence points to him as the robber, and the jury, given an either/or instruction, convicts him of robbery and (perforce) acquits him of possession of the proceeds. If the robbery conviction were reversed on the ground of insufficiency of the evidence, or, perhaps, on the ground that the circumstantial evidence identifying the accused as the robber was the fruit of an illegal search, the robbery conviction would fail. There would remain not the least doubt that the defendant had unlawfully possessed the proceeds, yet, because he had been "acquitted" of that charge, he could not be retried. The either/or instruction would thus allow a guilty individual to escape. While such occurrences may not be frequent, surely the correct rule would avoid any risk of such a miscarriage of justice if at all possible.

We submit, therefore, that the instructions to the jury should be formulated in such a way that (a) there is but a minimal chance that they will produce windfall acquittals for guilty individuals, and (b) they facilitate the application of the *Heflin* rule of priority (under which the robbery conviction should always be

given priority). As we show below, such rules can be formulated.

2. *The jury should be informed of the elements of each offense and allowed to return a verdict on the facts presented*

We acknowledge, of course, that our objection to the *Milanovich* either/or instruction would not be persuasive if the absence of such an instruction were prejudicial to defendants. But we do not understand how this can be so. The concern articulated by *Heflin* was that Congress had not intended to subject those who robbed a bank to pyramided punishment. Allowing the jury to return verdicts on both offenses does not create cumulative punishment, for the district court can impose but a single sentence, in accordance with the *Heflin* priority rule. Even if the Court also is concerned about the possibility of double convictions that do not lead to cumulative punishments, the mere submission of both counts to the jury does not lead to double convictions. The jury's verdict of guilt on both counts is not a conviction; only the court can enter judgment on that verdict, and the trial court can simply enter judgment on a single offense.[12]

There remains the concern that submission of both counts to the jury, with instructions allowing it to re-

[12] Courts of appeals that have discussed the problems of cumulative judgments (as opposed to cumulative punishments) have adopted this approach to Section 2113 cases. See, *e.g.*, *United States* v. *Faleafine*, 492 F. 2d 18 (C.A. 9) (*en banc*); *O'Clair* v. *United States*, 470 F. 2d 1199 (C.A. 1), certiorari denied, 412 U.S. 921; cf. *Gorman* v. *United States*, 456 F. 2d 1258 (C.A. 2); *United States* v. *Fleming*, 504 F. 2d 1045, 1052–1055 (C.A. 7); but cf. *United States* v. *Corson*, 449 F. 2d 544 (C.A. 3) (*en banc*).

turn verdicts on both, could somehow influence its deliberations in an impermissible fashion. We submit that this concern is nothing more than fanciful speculation. The indictment and evidence going to the jury will be the same whether or not an either/or instruction is given; moreover, with or without such an instruction the jury must necessarily be allowed to consider the circumstances of both the crime of robbery and the crime of possession. Any influence that one count could have upon the jury's consideration of the other will not be modified by the either/or instruction; on the contrary, the instruction simply serves to introduce an element of confusion into the jury's deliberations.

In our view, the either/or instruction denigrates the role of the jury as the body charged with fact-finding in a criminal trial. There is nothing inconsistent between the facts required to find an individual guilty of robbery and the facts required to find that he received, possessed or sequestered the goods subsequently. The jury logically can find that he did both. As we pointed out above, the bar to conviction is purely legal.[13] The jury traditionally has been given discretion to choose among offenses only when presented with greater and lesser included offenses, and even there its task requires it to find whether an element peculiar to the greater crime has been proved beyond a reasonable doubt. The jury's verdict, then, is required to turn on its resolution of the facts. By contrast, however, the either/or instruction invites a jury to pick and choose between offenses *both* of which are proved by the facts. That is a task that traditionally has been left to judges. See *Sansone* v. *United States*, 380 U.S. 343, 349–350 and n. 6; *Berra* v. *United States*, 351 U.S. 131, 134; *Andres* v. *United States*, 333 U.S. 740.

[13] As *Heflin* recognized (358 U.S. at 419): "It may be true that in logic those who divide up the loot following a robbery receive from robbers and thus multiply the offense."

This point has, we think, been made particularly well in *State* v. *Botta*, 27 Ohio St. 2d 196, 271 N.E. 2d 776, a recent decision of the Supreme Court of Ohio. *Botta* expressly rejected the *Milanovich* either/or instruction; the opinion explained (27 Ohio St. 2d at 198–199):

> [W]e believe that there is a clear-cut distinction between the right of the *jury* to pass on the *factual* issue of guilt and the right of the *court* to impose *sentence*. * * * The same considerations which would preclude imposition of separate sentences do not necessarily preclude separate factual determinations of guilt.
>
> * * * * *
>
> Were it not for the existence of the separate crime of larceny, there could be no question as to the right of the jury to conclude guilt as to receiving or concealing stolen property under such circumstances. With or without the existence of the separate crime of larceny, the fact-finding process of a jury * * * would be exactly the same.

Because the "fact-finding process of a jury * * * would be exactly the same" with or without an either/or instruction, the instruction need not be given. The concerns articulated by the *Heflin* Court—

double conviction and cumulative punishment—rest well within the power of the district court to prevent. We conclude, therefore, that no needful purpose is served by an either/or instruction and that its disadvantages, which we have discussed above, call for its abolition.[14]

B. A NEW TRIAL IS NOT NECESSARY TO RECTIFY THE OMISSION OF A REQUIRED EITHER/OR INSTRUCTION

If the Court accepts our argument that no either/or instruction was required, then the district court's charge to the jury was not erroneous, and the jury was entitled to return the verdicts as it did. The court imposed a single sentence on all counts. Respondents

[14] We have canvassed the state decisions that have addressed this problem since *Milanovich*. There appears to be a division among the States concerning the propriety of the either/or instruction. We caution, however, that most of those States requiring an either/or instruction do *not* require a new trial if the court neglects to give that instruction; we discuss the new trial problem at pp. 37–48, *infra*.

States requiring an either/or instruction: People v. *Perez*, 40 Cal. App. 3d 795, 115 Cal. Rptr. 405; *People* v. *Lamirato*, 180 Colo. 250, 504 P. 2d 661; *Commonwealth* v. *Obshatkin*, 307 N.E. 2d 341 (Mass. App.); *State* v. *Tritz*, 522 P. 2d 603 (Mont. Sup. Ct.); *Shepp* v. *State*, 484 P. 2d 563 (Nev. Sup. Ct.); *State* v. *Fioravanti*, 46 N.J. 109, 215 A. 2d 16; *People* v. *Colon*, 28 N.Y. 2d 1, 318 N.Y.S. 2d 929, 267 N.E. 2d 577, certiorari denied, 402 U.S. 905 (adhering to *People* v. *Daghita*, 301 N.Y. 223, 93 N.E. 2d 649 (Fuld. J.)); *State* v. *Koton*, 202 S.E. 2d 823 (W. Va. Sup. Ct.).

States not requiring an either/or instruction: Cannon v. *State*, 289 So. 2d 445 (Fla. App.); *Wells* v. *State*, 127 Ga. App. 109, 192 S.E. 2d 567; *State* v. *Houston*, 211 N.W. 2d 598 (Iowa Sup. Ct.); *Mercer* v. *Commonwealth*, 330 S.W. 2d 734 (Ky. Sup. Ct.) (adhered to in *Lindsey* v. *Commonwealth*, 383 S.W. 2d 333 (Ky. App.)); *State* v. *Botta*, *supra*; *Gossett* v. *State*, 224 Tenn. 374, 455 S.W. 2d 585; *State* v. *Flint*, 4 Wash. App. 545, 483 P. 2d 170.

therefore were neither convicted nor punished separately for the two offenses, and there is no reason to disturb the district court's judgment. It should be affirmed and, if the Court believes it necessary, the case should be returned to that court for resentencing.[15]

On the other hand, if this Court adheres to the requirement of an either/or instruction, it must decide what remedy is necessary to redress the district court's error in neglecting so to charge the jury. We submit that, under the circumstances of this and similar cases, new trials are costly luxuries unnecessary to cure this insubstantial error.

1. *New trials should not be ordered unless they are necessary to cure errors that resist alternative solutions.*

Trials of criminal cases are extremely complex undertakings. Every question asked of a witness implicates principles of evidence that took Wigmore ten volumes to explain. The charge to the jury must draw upon legal rules laid down in literally thousands of this Court's cases. Extemporaneous arguments of counsel may negligently offend principles that would have been respected had there been greater time to research and prepare.[16] At any stage during a trial—particularly a jury trial—errors may be made. The likelihood of transgression grows exponentially as our developing legal system produces more and more rules that, when followed, improve the quality of justice.

In the quest (regrettably, quixotic) for perfect justice, it may be tempting to follow the path of

[15] But see note 8, *supra*.

[16] See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646–647.

rectifying every error by ordering a new trial. But although the new trial will be rid of the error in question, it perforce will offer new occasions for new error. The error cured today may be replaced with other errors as yet unknown.

Even if we could be assured that the second trial would be superior to the first, such trials are a costly balm. They consume scarce judicial resources and, by taking time from other trials, introduce additional delays into the administration of criminal justice. If the judge compensates by increasing his trial load, he may be forced to sacrifice legal study, and so increase the chance of mistake in all of the cases he tries. New trials are also costly in prosecutorial time; the trials of other individuals may have to be postponed or foregone altogether. Finally, they are costly in terms of the achievement of the ends of public justice itself. It is a truism that justice delayed can become justice denied, both for the individual who is to be retried and for other individuals whose trials must be postponed to accommodate someone else's second trial. Evidence may be lost, the memories of witnesses may fade, and witnesses may die or decline to testify. These changes in the conditions of the trial may make a second trial—even if free of "error"—less "fair" than the first. And the degradation in the quality of justice may impair the accused's opportunity to have a fair trial no less than the government's ability to prosecute those guilty of crime.[17]

[17] This case illustrates the problems that can be presented by second trials. We have been informed by the United States Attorney that Davis, the government's principal witness at the first trial and the only witness who was able personally to identify respondents as the robbers, has a new attorney, through whom he has demanded release from prison in return for his cooperation as a witness at a second trial. Of course, because more than 120 days have passed since Davis's conviction became final, neither the prosecution nor a court could provide him with the relief he seeks, nor would it serve the interests of justice to do so even if his release could be arranged. Although Davis presumably could be compelled to testify—his Fifth Amendment privilege has been extinguished by his conviction for this crime—such involuntary testimony might well be inadequate. Another alternative would be to introduce the transcript of Davis's testimony at the first trial (see Fed. R. Evid. 804(b)(1)); this, too, is less than a satisfactory substitute and would produce a trial inferior in quality to respondents' previous trial.

Because new trials are costly in so many ways, Fed. R. Crim. P. 52(a) provides that errors should be noticed only if they affect the substantial rights of a defendant. This Court has repeatedly applied that principle to hold that, although an accused is entitled to a fair trial, he is not entitled to a perfect one. *Lutwak* v. *United States,* 344 U.S. 604, 619; *Hamling* v. *United States,* 418 U.S. 87, 134–135. Cf. *Harrington* v. *California,* 395 U.S. 250. Even if there has been an error affecting substantial rights, the error should lead to a new trial only if it is impossible to employ other means to rectify the error. We submit that this is an occasion where rectification without a new trial is both possible and desirable.

2. Failure to give an either/or instruction can be rectified by vacating the surplus conviction

The error, if any, in failing to give an either/or instruction affects neither the conduct of the trial nor the jury's resolution of any disputed issue of fact. As

Heflin points out, the focal objection is to multiple convictions or cumulative punishments of an offender who has committed what is, in the contemplation of Section 2113, but a single crime. The problem of multiple convictions and cumulative punishments can be completely cured by vacation of the surplus conviction and, if necessary, a remand for resentencing in the event the district court may have enhanced its sentence because of a mistaken belief that separate crimes had been committed. This is the course followed by the vast majority of the States that have considered this question since this Court's decision in *Milanovich*; the remedy of remand for a second trial on both counts has been rejected by those States.[18] See also *Green* v.

[18] We have listed in note 14, *supra*, the States that do not require an either/or instruction. In those States, of course, failure to give such an instruction is not error and no new trial is necessary.

Of the States that, since *Milanovich*, have considered the question and require an either/or instruction, only two (Nevada and West Virginia) require a remand for a new trial, and in both of those cases the facts indicated that the accused was guilty only as an accomplice to the robbery. See *Shepp* v. *State*, 484 P. 2d 563 (Nev. Sup. Ct.); *State* v. *Koton*, 202 S.E.2d 823 (W. Va. Sup. Ct.). All of the other authorities set out in note 14, *supra*, hold that if an individual is convicted of both robbery and possession of the proceeds, the error can be cured by vacating the conviction for possession. See, *e.g.*, *State* v. *Fioravanti*, 46 N.J. 109, 215 A.2d 16, 25 (Weintraub, C. J.), in which the *court* lists *Milanovich* as *contra* and states: "[O]ur cases have consistently held that if a general verdict of guilty is returned upon counts for both larceny and receiving, sentence may be imposed, indeed upon the higher offense if they differ as to severity of authorized punishment, so long as the evidence justifies the verdict of guilty as to that cout."

And see *People* v. *Daghita*, 301 N.Y. 223, 93 N.E. 2d 649 (adhered to in *People* v. *Colon*, *supra*) in which the court, speaking through Judge Fuld, held that when the evidence of defendant's guilt of larceny "is well-nigh overwhelming, no purpose would be served by requring a new trial."

United States, 365 U.S. 301, in which an accused had been given separate but concurrent sentences for violations of Section 2113(a) and (d). The plurality held that this was improper and that the remedy was to vacate the lesser sentence.

3. The reasons adduced in Milanovich to support a second trial do not withstand scrutiny

If, as we contend, the concerns underlying *Heflin* can be so painlessly and completely redressed without a new trial, there is no need to hold one. *Milanovich* suggests three reasons for affording the defendants a new trial, but, as we attempt to demonstrate below, none of those reasons is adequate to justify the result reached.

Milanovich suggests that it is improper for a court to speculate about which crime a properly instructed jury would have selected for conviction. The court would be compelled to "speculate" into the course a jury would have chosen only if the jury has unguided discretion to select which course to follow, and we have argued above (see pp. 20–22) that *Milanovich* implicitly held that the jury has such discretion. But this refusal to recognize or establish a rule of priority is inconsistent with the legislative history of the bank robbery act. The root cause for holding that an individual cannot be punished for both robbery and possession of the proceeds is this Court's conclusion, articulated in *Heflin*, that Congress had not authorized cumulative punishments for robbers. But if this was the congres-

sional design, then a rule of priority, applicable to facts similar to those in *Milanovich* as well as to facts like those here, follows inexorably. Under Section 2113 one *who has been convicted* of robbery is not subject to conviction for possession. No discretion is entrusted to the jury. The jury must examine the robbery charge first and, if it concludes that the accused is a robber, convict on that charge. Only then does the accused acquire insulation against a separate conviction for possession. A district court or an appellate court can proceed in the same fashion; if the jury *has* convicted of robbery, that conviction should be affirmed. This does not require an appellate court to usurp the role of the jury; it need only apply legal rules to factual conclusions already reached *by the jury itself*. Nor must the appellate court "speculate" into what the jury would have done; the jury in the instant case convicted of robbery, and a jury properly instructed about the priority rule would have done the same thing. No "speculation" is necessary; the jury has completed its entire fact-finding and guilt-determining function.

This is the course that courts follow when a jury is improperly allowed to convict of both a greater and a lesser included offense, even though it should have been told that, if it convicts of the greater, it should pretermit the lesser. The district court, or an appellate court, routinely vacates the conviction on the lesser offense and does not require a second trial. See, *e.g., Fuller* v. *United States*, 407 F. 2d 1199, 1227, 1230 (C.A.D.C.) (*en banc*), certiorari denied, 393 U.S. 1120. We are aware of no holding that this procedure

usurps the role of the jury or amounts to improper speculation. Even when the jury has "acquitted" of the lesser offense incident to conviction of the greater, an appellate court, upon finding the evidence insufficient to support the greater but sufficient to support the lesser, may in the interests of judicial economy remand for entry of a judgment of conviction on the lesser count, where such a result accords with the purport of the jury's verdict. *Allison* v. *United States,* 409 F. 2d 445, 451–452 (C.A.D.C.). The court's action in entering a single judgment on the robbery conviction is much less intrusive into the functioning of the jury.[19]

A second reason for retrial suggested by *Milanovich* is that verdicts of guilt on both robbery and possession counts are inconsistent. This is so only by operation of law; they are not factually inconsistent, in the sense that it would be physically impossible for one who robbed the bank to possess the proceeds as well. Indeed, it is physically difficult to do otherwise (once the concept of constructive possession is considered). But even if the verdicts are "inconsistent" in some

[19] In a similar vein, this Court has recognized that if a defendant is given a concurrent sentence on several counts, and the conviction on one count is found to be good, an appellate court may as a discretionary matter not consider the validity of the conviction on the other counts. *Barnes* v. *United States*, 412 U.S. 837; see also *Benton* v. *Maryland*, 395 U.S. 784. One of the rationales underlying this doctrine is that the bad count (or counts)—even if it should not have been submitted to the jury—does not ordinarily influence the jury with respect to the valid count (or counts). It is surely difficult to square the concurrent sentence doctrine with the new trial requirement of *Milanovich*.

a case reasonably, conscientiously, and intelligently. *Duncan* v. *Louisiana,* 391 U.S. 145, 157. Cf. *McGautha* v. *California,* 402 U.S. 183. The available evidence strongly supports this faith in the intelligence and rationality of the jury. See Kalven & Zeisel, *The American Jury* (1966). Verdicts are not set aside on mere speculation regarding the possibility of improper action (*Murphy, supra*).

We assume, therefore, that the Court did not mean to imply that a new trial was required simply because the jury that convicted Mrs. Milanovich might have behaved irrationally if it had been properly instructed. But if the Court meant instead that there is some possibility that a *second* jury would be disposed to lenity—to "nullification" in spite of the evidence—we submit that this is not a proper ground upon which to remand for a new trial. It is an argument that would require retrial after all trials, for it is always possible that some other jury would refuse to convict in spite of evidence sufficient to convince most juries. The argument that a second jury might be disposed to dispense mercy withheld by the first is not an argument for new trials; the accused should be entitled to but one opportunity to benefit from dispensations of this sort.

We are aware of only one class of cases in which the possibility that a properly instructed jury would have exercised a lenity-dispensing power is sufficient to require a second trial. A defendant is entitled to a lesser included offense instruction if "the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater"

sense, this is not a ground for a new trial. *Hamling* v. *United States, supra,* 418 U.S. at 101; *United States* v. *Dotterweich,* 320 U.S. 277, 279; *Dunn* v. *United States,* 284 U.S. 390, 393. Inconsistency would be objectionable, if at all, only in the rare case in which the nature of the verdict returned demonstrated that the jury could not have been attentive to the trial evidence or to the court's instructions. This is hardly so here, for under the court's instructions the jury was permitted to (and did) return verdicts on all counts. Indeed, respondents would have better reason, in light of the district court's instructions, to claim "inconsistency" if the jury had returned a verdict of guilty of robbery and not guilty of possession, or the reverse.

Finally, *Milanovich* intimated that a second trial is required because a properly instructed jury might "conceivably" have acquitted of both counts. We find this intimation hard to evaluate. It appears to imply that a jury, correctly instructed on the elements of each offense and convinced beyond a reasonable doubt that a defendant has engaged in the elements of both, would, if instructed that it could convict of but one, decide instead to convict of neither. This imputes to a jury a degree of irrationality unknown to our law. Indeed, it runs counter to the institution of the jury itself, which presupposes that, on important questions affecting the liberty of a defendant—at least when screened from prejudicial pressures (*Murphy* v. *Florida,* No. 74–5116, decided June 16, 1975) and from legally inadmissible but "powerfully incriminating extrajudicial statements" (*Bruton* v. *United States,* 391 U.S. 123, 135)—the jury can be trusted to decide

(*Keeble* v. *United States,* 412 U.S. 205, 208). A defendant who is convicted of the greater offense after the trial court erroneously denied a lesser included offense instruction has the right to a retrial (or perhaps to a remand for entry of judgment on the lesser count) even though the evidence supports his original conviction. See *Sansone* v. *United States, supra; Berra* v. *United States, supra; Sparf* v. *United States,* 156 U.S. 51. See also *Young* v. *United States,* 309 F. 2d 662 (C.A.D.C.).

A close examination of this doctrine, however, demonstrates that it does not support *Milanovich.* The defendant in the lesser included offense cases is entitled to a retrial only when there was a rational basis, demonstrable on the record of the first trial, for a verdict of acquittal of the offense charged and a conviction of the included offense; that limitation is basic to the area of lesser included offenses, "where the doctrines have been shaped from the start so as to exclude claims based on the hope of irrational * * * verdicts" (*Fuller* v. *United States, supra,* 407 F.2d at 1232). The premise supporting a second trial where a lesser included offense instruction was improperly denied at the first trial is that a jury, put to a choice between acquittal and conviction of the greater offense, might disregard what would otherwise be a reasonable doubt about the existence of the disputed fact distinguishing the greater from the lesser offense. But that rationale did not apply in *Milanovich* itself: the evidence on the two counts was distinct, and both counts went to the jury; the Court held that the jury had been afforded too many, not too few, fact-finding options. Nor does the lesser included offense rationale apply to the instant case; here, there was no rational basis, demonstrable on the record, for a verdict acquitting respondents of robbery and convicting them of possessing the proceeds. Quite the contrary. On the facts presented, acquittal on the former would rationally have compelled acquittal on the latter.

Speculation that the jury might have been inclined to dispense mercy by drawing a distinction unsupported by the evidence does not create a right to a lesser-included-offense instruction. As the District of Columbia Circuit stated in *Kelly* v. *United States,* 370 F.2d 227, 229, certiorari denied, 388 U.S. 913, "An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction." See also *United States* v. *Markis,* 352 F.2d 860, 867 (C.A. 2).

Finally, unlike the erroneous refusal to grant a lesser-included-offense instruction, the absence of an either/or instruction in this case did not eliminate one of the jury's available fact-finding options but actually added to them. See *Keeble* v. *United States, supra,* 412 U.S. at 212–213.

It appears, therefore, that there is no persuasive reason to provide respondents a new trial. A rule that would entitle respondents to a new trial is contrary to the well-settled principle that retrials are not justified when there is no showing of prejudice other than the argument, cast in terms of jury room mystique, that "somehow the whole thing might have gone differently

BEST COPY AVAILABLE

had only the words been changed a bit" (*Fuller* v. *United States, supra,* 407 F. 2d at 1232). Respondents, fairly convicted of robbery, should not be given the windfall of a new trial merely because of the barely credible possibility that the original jury, if "forced" to choose, irrationally might have elected to convict them of possession or acquitted altogether. If *Milanovich* compels a new trial in these circumstances, then *Milanovich* should be overruled.

III

IF RESPONDENTS MUST BE TRIED AGAIN, THE NEW TRIAL SHOULD BE LIMITED TO THE QUESTION OF WHICH CRIME THEY COMMITTED

If the Court disagrees with all of the arguments we have presented above and concludes that respondents are entitled to a second trial on all counts, we respectfully request it to delineate the questions that will be open to consideration during that trial. The court of appeals did not address this question, but simply remanded for a new trial; we presume from the generality of its judgment (Pet. App. B) that it would allow respondents to argue (as they argued at their first trial) that they are innocent of all offenses. It is not clear to us why respondents should be allowed to present that argument to the jury. The only reason for the remand and second trial would be that the jury must be allowed to choose between offenses. There is no need to put to a jury the additional question whether respondents have committed *any* offense; that question was settled by the first jury, and there is no reason to believe that any error infected the first jury's

conclusion that respondents were guilty of an offense.

It is superficially plausible that our arguments in this regard should be presented to the district court on remand rather than to this Court. We think it may be appropriate, however, for this Court to pass upon the matter at this stage of the litigation, because the district court will be bound by the terms of this Court's mandate, whatever those terms may be. Moreover, our position is arguably inconsistent with the suggestion in *Milanovich* (365 U.S. at 555) that a properly instructed jury might have acquitted altogether, and, if the Court does not clarify the issues open on a second trial, we doubt that a district court or court of appeals would feel free to disregard the implications of that language.[20]

Furthermore, unless the issue is resolved here, it will be impossible for the government to obtain review of an adverse decision in the district court. If that court decides to resubmit the general question of guilt or innocence to the jury, and the government prevails before that jury, it will have no grievance requiring appellate review. On the other hand, if the jury, so instructed, acquits altogether, the Double Jeopardy Clause may preclude appeal since another retrial with proper instructions would be barred. And in either

[20] For purposes of this argument we must discount, of course, the possibility that the first jury, if given an either/or instruction, would have acquitted. As we argued above, however (pages 44–48, *supra*), that argument presumed that juries act irrationally, and a hypothetical possibility of irrational conduct by some other juries is not an adequate basis on which to impeach this jury's actual behavior.

event there will have been burdensome and unnecessary relitigation of issues already fairly decided by the first jury. We therefore believe that it is appropriate, if this Court decides that respondents must be retried, for the Court to indicate what issues would be open on the retrial.

The procedure we have suggested—retrial limited to the question of culpability for one offense or the other—is an uncommon procedure in criminal cases, and we know of no precedent for it in this Court. But *Milanovich* is an uncommon case, and limited retrial is used in analogous situations. Fed. R. Civ. P. 59 expressly provides for limited retrials in civil cases, and this Court has approved the practice. In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, the court of appeals had set aside a verdict entered after a civil jury trial and remanded for a second trial limited to the issue of the quantum of damages. Petitioner argued to this Court that the second trial, so limited, would deprive it of its constitutional right to trial by jury. This Court unanimously disagreed (283 U.S. at 497, 498, 499):

> It is true that at common law there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all. [Footnote omitted.]
>
> * * * * *
>
> * * * But we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury is that issues of fact be submitted for determination

> with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by the rules governing trials at common law.
>
> * * * * *
>
> * * * Here we hold that where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again.

The procedure of remanding for a new trial on limited issues is rare in criminal cases only because the circumstances that would call it forth are rare. As the Court emphasized in *Gasoline Products* (283 U.S. at 500), the issues to be taken as settled at the second trial must have been adequately determined in the first trial and must be sufficiently separable from the issue to be retried that "a trial of it alone may be had without injustice." [21]

Ordinarily, in a criminal case, any error requiring an appellate court to set aside a judgment would fall into one of two categories: (a) the error affected the evidence heard or the way in which the jury was to deal with the evidence, so that the error infected the entire fact-finding process; or (b) the error could be corrected without a second trial. We have, of course, contended above that the error, if any, in not giving the jury an either/or instruction falls into the latter category. But if the Court disagrees with that assessment,

[21] The *Gasoline Products* rule has been extensively elaborated upon in civil cases. Retrials routinely are limited to single issues when other issues have been reliably determined by the first jury. See the cases collected in 6A Moore's *Federal Practice* ¶ 59.06 (1974).

we contend that, quite plainly, the error does not fall into the former grouping. The lack of an either/or instruction does not affect the evidence introduced at trial, the arguments of counsel, or the way in which the jury will evaluate the facts. There is no reason to think that the lack of an either/or instruction caused the jury at respondents' trial falsely to conclude that respondents did, in fact, rob the bank and carry away the proceeds. The only problem was that the jury was not adequately informed what it should do with its conclusion that respondents *both* robbed the bank and possessed their booty. It would, therefore, be an adequate remedy to tell the second jury that, at a prior trial, a jury has determined that respondents both robbed the bank and carried away their loot; the second jury then would be told to evaluate, in light of such evidence as the government and defense introduced, for which of the two crimes respondents should be convicted.[22]

We are aware of no salient difference between civil and criminal cases that would make the device of partial retrial inappropriate in criminal cases.

[22] We can imagine only a few classes of criminal cases in which retrials might be similarly limited. When a jury erroneously is not given a lesser included offense instruction and convicts of the greater offense as charged, it should be proper to limit a second trial to the choice between the greater and lesser offenses. As another example, when a jury is given improper instructions regarding an insanity defense and convicts of the crime as charged, it would be proper to limit a retrial to the issue of insanity. Such "release hearings" are routinely held in federal cases when insanity is belatedly injected into a case. *Whalen* v. *United States*, 346 F.2d 812 (C.A.D.C.), certiorari denied, 382 U.S. 862; *United States* v. *Wright*, 511 F.2d 1311 (C.A.D.C.).

As one court has written, the basic rationale for limiting the issues upon retrial is that when a "[d]efendant * * * has had a fair trial on the issue of liability[,] * * * it would be * * * grossly unfair to plaintiff * * * to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor." *Yates* v. *Dann*, 11 F.R.D. 386, 394 (D. Del.). That interest is the same whether the controversy is civil or criminal. So, too, the defendant's interest in trial by jury is the same; although criminal defendants are entitled to jury trial of issues that need not be submitted to civil juries, and although the prosecution bears a higher burden of proof in a criminal case, neither of these differences is implicated in a partial retrial. Here the issues already have been presented to a jury, which concluded that the prosecution had shown, beyond a reasonable doubt, that respondents both robbed the bank and possessed the proceeds of that robbery.

Nor do we think it important that there is no rule of criminal procedure comparable to Fed. R. Civ. P. 59. The statute governing remedies by this Court (28 U.S.C. 2106) provides that the Court can remand to "require such further proceedings to be had as may be just under the circumstances."[23] This provision has been expansively construed (*Bryan* v. *United*

[23] 28 U.S.C. 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

States, 338 U.S. 552) and is more than adequate to support an order of retrial limited to specified issues should the Court believe such an order "just under the circumstances."

We submit, therefore, that respondents' retrial, if one is necessary, should be limited to a trial the sole function of which is to give the jury a choice between conviction of respondents for robbery or conviction of respondents for possession of the proceeds. It was, after all, the failure of the first jury to exercise such a choice that is the predicate for requiring further proceedings; we see no reason why the further proceedings should be more extensive than the rationale for requiring them to be held. This is especially so since witnesses may die or disappear, evidence may be lost or destroyed, and recollections may dim between the first and second trials; an acquittal on both counts at a second trial that is the product of factors such as these could hardly be said to comport with the ends of public justice.

Although there is no exact precedent for this procedure in federal criminal cases, there is a wealth of analogies, all of which suggest that the procedure is both desirable and proper. Many States (and some federal courts) hold bifurcated trials, at which one jury determines liability for the crime and a second jury assesses the punishment (see *McGautha, supra*). The second jury is not at liberty to set at naught the first jury's determination of liability. Although multiple jury proceedings are uncommon in the federal system, one has been created by the Antihijacking Act of 1974, Pub. L. 93–366, 88 Stat. 409, 411, adding 49

U.S.C. 1473(c)(2)(B)(iii); and, even though the federal system does not use multiple juries as a matter of course, there should not be an impediment to the creation of a separate "penalty" jury where, as here, the first jury has been dismissed without making the election required by the either/or instruction set out in *Milanovich.* There is no need to resubmit to the jury at a new trial the general issue of guilt or innocence, which already has been decided adversely to respondents after a trial fair in all particulars.

Similarly, the doctrine of "law of the case" provides that an issue fairly decided between two parties in an ongoing proceeding remains decided throughout the course of those proceedings. As applied to this case, the determination by the jury that respondents committed all of the acts necessary to establish their guilt should become "law of the case," not subject to reexamination in subsequent proceedings. "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States* v. *United States Smelting Refining & Mining Co.,* 339 U.S. 186, 198. The same principle applies here: the question of respondents' participation in the robbery has been litigated and decided; it need not be submitted to another jury.[24]

Finally, the analogy to collateral estoppel is suggestive. Collateral estoppel precludes two parties from

[24] We are not aware of any case intimating that the doctrine of law of the case is inapplicable to criminal cases. The contrary seems widely accepted. See *United States* v. *Van Sirrs,* 434 F. 2d 1026 (C.A. 9).

relitigating questions already decided between themselves in an earlier proceeding. This Court has held that its use by a defendant against the prosecution is part of the defendant's protection against double jeopardy (*Ashe* v. *Swenson,* 397 U.S. 436). Collateral estoppel also precludes defendants from relitigating issues previously decided adversely to them in criminal proceedings. See, *e.g., Hernandez-Uribe* v. *United States,* 515 F. 2d 20 (C.A. 8); *United States* v. *Colacurcio,* 514 F. 2d 1 (C.A. 9); *Pena-Cabanillas* v. *United States,* 394 F. 2d 785 (C.A. 9); *United States* v. *Rangel-Perez,* 179 F. Supp. 619 (S.D. Cal.) If the accused has had, in the first proceeding, adequate opportunity and incentive to litigate an issue, there is nothing unfair in binding him, in later proceedings, to the first tribunal's resolution.[25]

When in the past this Court has had occasion to consider the effect of collateral estoppel, it has often pointed out that the estoppel effect is the same in criminal cases as it is in civil cases. The estoppel "'principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction.' *Frank* v. *Mangum,* 237 U.S. 309, 334 (1915); *Sealfon* v. *United States,* 332 U.S. 575, 578 (1948)." *Emich Motors Corp.* v. *General Motors Corp.,* 340 U.S. 558, 568. See also *United States* v. *Oppenheimer,* 242 U.S. 85.

[25] See vestal and Coughenour, *Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 Vand. L. Rev. 683, 698 (1966): "[I]t would seem completely reasonable to hold that preclusive effect can be given to a conviction" so that an accused is precluded from relitigating the issues decided adversely to him. See also *State* v. *Sargood*, 80 Vt. 412, 68 A. 51.

We conclude that it is not inappropriate to instruct a jury on remand that respondents' participation in the crime has been decided adversely to them in a prior proceeding that is conclusive on the issue. The second jury should be instructed that its task is to exercise the discretion to choose between the offenses.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for further proceedings consistent with the opinion of this Court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
ANDREW L. FREY,
Deputy Solicitor General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
JEROME M. FEIT,
HARVEY M. STONE,
Attorneys.

JULY 1975.

APPENDIX

The federal bank robbery act, 18 U.S.C. 2113, provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession

of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporations.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in

section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

U.S. GOVERNMENT PRINTING OFFICE: 1978